2006

Salt Lake City v. Guy Montoya : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

SALT LAKE CITY,	)	
	)	
Plaintiff and Appellant,	)	
	)	
vs.	)	**CASE NO. 20060828 - CA**
	)	
	)	
	)	
GUY MONTOYA,	)	
	)	
Defendant and Appellee.	)	
	)	
	)	

REPLY BRIEF OF APPELLEE, GUY MONTOYA

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES CITED

CONSTITUTIONAL PROVISIONS, STATUTES AND OTHER RULES

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IN THE UTAH COURT OF APPEALS

SALT LAKE CITY, INC, APPELLANT, -VS- GUY MONTOYA, APPELLEE.	APPELLEE'S REPLY BRIEF [Utah R.App.P. Rule 24 (c)] Appellate Case No. 20060828

ISSUE PRESENTED FOR REVIEW

The trial court did not err when it held that Utah Highway Patrol Trooper Mark Nichols lacked the requisite reasonable articulable suspicion when he made a traffic stop of Appellee's Guy Montoya's motor vehicle the evening of October 31, 2003.

STIPULATION OF STATUTES AND RELEVANT FACTS

Appellee Guy Montoya stipulates to the brief statement of facts as outlined in the State's Opening Brief on page 5, with the exception of the following:

1. The reason Trooper Nichols made the stop of Mr. Montoya's car was that he saw Mr. Montoya move out of the regular lane of travel and pull over to the curb without signaling. (Appellant's Brief, p. 5)

ARGUMENT

I. THE TRIAL COURT'S FINDING THAT TROOPER NICHOLS DID NOT HAVE REASONABLE ARTICULABLE SUSPICION TO STOP MR. MONTOYA WAS NOT AN ERRONEOUS CONCLUSION OF LAW.

It is a well established principle of constitutional law that the Fourth Amendment applies to traffic stops regardless of the reason for the stop, and that an officer may only "stop and question a person when [he] has reasonable, articulable suspicion that the person has been, is, or is about to be engaged in criminal activity." *State v. Pena,* 869 P.2d 932, 940 (Utah 1994) (citing *United States v. Place,* 462 U.S. 696, 702-03, 103 S.Ct. 2637, 2642, 77 L.Ed.2d 110 (1983)). According to the State's Opening Brief, the reason Trooper Nichols made the stop of Mr. Montoya's motor vehicle was that he saw Mr. Montoya pull over to the curb without using his vehicle's

turn signals for a continuous three seconds immediately preceding his movement to the right side of the road, thus violating Utah Code Ann. § 41-6-69, which was the Utah Traffic Code in effect at the time of Mr. Montoya's traffic stop. In relevant part, Utah Code Ann. § 41-6-69 stated:

> (1) (a) A person may not turn a vehicle or move right or left on a roadway or change lanes *until the movement can be made with reasonable safety* and an *appropriate signal* has been given under this section. (Emphasis added).
>
> (b) A signal of intention to *turn* right or left *or to change lanes* shall be given continuously for at least the last three seconds preceding the beginning of the *turn or change.* (Emphasis added).
>
> (2) A person may not stop or suddenly decrease the speed of a vehicle without first giving an *appropriate signal* to the operator of any vehicle immediately to the rear when there is opportunity to give a signal. (Emphasis added).

The subsection which, according to the plain language and the plain reading of the statute, required a continuous signal for at least three seconds was subsection (1) (b). This subsection specifically required a continuous three-second signal under two conditions only, *turning* or *changing lanes*, not *moving* right or left upon a roadway. Subsection (1) (a) of the statute, which articulated the condition that allegedly gave Trooper Nichols probable cause to effect the traffic stop of Mr. Montoya, required only that an "appropriate signal" be given, but did not specify

what that appropriate signal should be. Similarly, subsection (2) of the statute also required that a driver give an "appropriate signal" to a vehicle immediately behind him if the driver intended to stop or decrease speed. Like subsection (1) (a), subsection (2) failed to specify what that "appropriate signal" should be, but it clearly could not have referred to the continuous, three-second turning signal required to be given under subsection (1) (b) because stopping or decreasing speed is not synonymous with turning or changing lanes. Likewise, moving right or left upon a roadway is not synonymous with turning or changing lanes.

During the hearing on Defendant's Motion to Suppress, the State conceded that Trooper Nichols had "acknowledged that this isn't a turn, and didn't consider it a turn; but did consider it a movement upon the roadway." (R. 367, Addendum A p. 19). In the appellant's Opening Brief, the State focuses a great deal on two specific cases where both this Court and the Tenth Circuit Court of Appeals equate a defendant's action of pulling to the side of the road with the proscribed conduct of moving right or left upon a roadway, thereby holding in each case that the peace officers were justified in stopping the vehicles of the defendants. (Appellant's Brief, pp. 7-8, citing *State v. Preece,* 971 P.2d 1 (Utah App. 1998) and *U.S. v. Parker,* 72 F.3d 1444 (10th Cir. 1995)). However, the city creates a wrong impression of the facts of these cases as applied to the present case. Upon close scrutiny of both *Preece* and

Parker, it becomes clear that the sets of circumstances surrounding those investigative traffic stops were factually distinguishable from the present case.

In *Preece,* the circumstances involved a defendant initially driving about fifteen miles per hour below the speed limit, with his turn signal blinking for a quarter of a mile. The driver, Preece, temporarily turned his blinkers off, then back on, made a left-hand turn, and proceeded at about twenty to thirty miles per hour below the speed limit on a fifty to fifty-five miles-per-hour highway. The peace officer who had been following Preece finally effected an investigative stop of the vehicle when he noticed that Preece suddenly left the highway onto the shoulder of the road, come to nearly a complete stop, and then drifted back onto the highway. Preece had neither signaled when weaving onto the shoulder or when re-entering the highway.

Similarly, *Parker* involved a defendant driving on I-15, a freeway, who on more than one occasion swerved part-way into the emergency shoulder lane and continued to drive there for about two hundred feet before the peace officer following him activated his emergency lights and effected a traffic stop.

By breaking down the facts of these cases and applying them to the present case, it is obvious that the defendants in both *Preece* and *Parker* displayed an entire pattern of erratic driving behavior which, as the courts held, gave the peace officers not only reasonable suspicion but probable cause to conduct investigative traffic stops

of the vehicles. Unlike the cases cited by the State, the case at hand does not present any set of circumstance similar to those above. Mr. Montoya was not driving on the freeway, a highway, or even a principal city street. While it is true that highways and small residential streets have no statutory distinction, case law affords considerable weight to the "totality of circumstances" surrounding a peace officer's articulable and reasonable suspicion to stop a driver. *State v. Potter,* 863 P.2d 40, 43 (Utah App. 1993) (citing *United States v. Sokolow,* 490 U.S. 1, 8, 109 S.Ct. 1581, 1585, 104 L.Ed.2d 1 (1989)).

At the hearing on Defendant's Motion to Suppress, Trooper Nichols testified that he had "no articulable suspection (sic) that [driver Montoya] was under the influence at the time . . ." There was no evidence of erratic driving behavior such as the ones displayed by the defendants in the cases cited by the State. In fact, there was no evidence of erratic driving behavior by Mr. Montoya whatsoever.

As further support for its argument that Mr. Montoya's actions violated the "move right or left" portion of Utah Code Ann. § 41-6-69, the State also focuses on *U.S. v. Gregoire,* 425 F.3d 872 (10th Cir. 2005), a case involving a driver who merged onto I-70, another freeway, without signaling while he was still on the on-ramp. Again, the roadway in *Gregoire* was designed for high speed traffic, unlike a residential street, and there were clear road markings which indicated when a driver

must begin to merge and therefore signal. As already established during the hearing on Defendant's Motion to Suppress, Washington is an unmarked street with no lanes to speak of, and the action of pulling one's vehicle over to the curb in order to park is not tantamount with driving onto or off a freeway ramp. It must also be noted that *Gregoire* acknowledged that the issue before the court was a "close" call, citing a Seventh Circuit case involving Utah Code Ann. § 41-6-69, where a panel of the Seventh Circuit Court of Appeals held that a traffic stop based on the statute was invalid and failed to establish probable cause. *Id.* at 877 (citing *United States v. Powell,* 929 F.2d 1190 (7th Cir. 1991).

In sum, Mr. Montoya's action of pulling his vehicle by the side of a residential curb in order to park , while superficially akin to the circumstances surrounding *Preece, Parker,* and *Gregoire,* is diametrically distinguishable from weaving in and out of an emergency shoulder lane on a freeway or highway, and also very different than merging from a clearly marked on-ramp into a high-speed freeway. Thus, neither Utah nor Tenth Circuit case law truly supports the State's argument that Mr. Montoya's actions the evening of October 31, 2003 ubiquitously required the use of turn signals for a continuous three-second period immediately preceding his vehicle's movements.

The closest sources available for a definition of which type of signal *was*

"appropriate" at the time of Mr. Montoya's actions are Utah Code Ann. § 41-6-70, Utah Code Ann. § 41-6-71, and the 2003 Utah Driver Handbook used at the hearing on Defendant's Motion to Suppress. The three statutes, § 41-6-69, § 41-6-70, and § 41-6-71, when read in conjunction with the Driver Handbook, which by itself is of course not controlling, clearly seem to establish that different types of signals applied to different types of vehicle action. For example, according to both § 41-6-71 and the Driver Handbook, a specific hand signal or light signal was required when a driver was turning, and another specific hand signal or light signal was required when a driver was decreasing speed or stopping.

Neither § 41-6-70, § 41-6-71, or the Driver Handbook stated what type of signal was "appropriate" when a driver was moving right or left upon a roadway or pulling over to a curb. The Driver Handbook only articulated that a continuous, three-second turn signal was expected when a driver turned, changed lanes, or pulled *away* from a curb. *Id.*

To shed a bit more light on the matter, Utah Code Ann. § 41-6-70 required that a "stop signal" be given either by a driver's hand or a "signal lamp," but this statute also failed to specify what constituted an appropriate lamp signal in a stop situation. Again, though not controlling, the only other source available for a definition of "appropriate signals" was the 2003 Utah Driver Handbook, which stated that the

appropriate signal in a stop or decreased-speed situation was the application of a vehicle's brake lights, provided they were "operating properly and [could] be readily seen." (July 2003 Utah Driver Handbook, p. 12).

The most accurate statement that can be said in terms of Mr. Montoya's statutory obligations under Utah Code Ann. § 41-6-69 (1) (a) is that an "appropriate signal" needed to be made. Furthermore, given that Mr. Montoya's actions also closely fit the description under § 41-6-69 (2), § 41-6-70, and § 41-6-71 (3), decreasing his vehicle's speed and stopping, there is every clear indication that an appropriate signal, the application of his brake lamps, was given. The State only argues, in Roman numeral *I* of its Opening Brief, that "according to the plain reading of the statute, when Mr. Montoya changed or moved his vehicle from the lane of travel onto the far right shoulder . . . the ordinance requires he use his signal." *(Id.* at p. 9). However, the evidence demonstrates that Mr. Montoya in fact did not move from the lane of travel onto a "far right shoulder" because there was no far right shoulder of travel or of emergency to move into. There was only a residential street with no lane markings and scarcely enough space for vehicles to park along both sides of the road. Thus, an appropriate and sufficient signal for drivers immediately to the rear would have been Mr. Montoya's properly operating brake lights. At the hearing on Defendant's Motion to Suppress, Trooper Nichols testified that Mr.

Montoya's motor vehicle appeared in every respect to be operating properly and no evidence has been presented to contest the fact that his brake lights could be readily seen.

Therefore, because there was no plain statutory language that required Mr. Montoya to use a continuous, three-second *turn* or *lane change* signal before slowing down to park his motor vehicle by the curb, and because no case law has been cited that mandated this course of action, Officer Nichols did not stop Mr. Montoya's motor vehicle pursuant to the plain language and plain reading of Utah Code Ann. § 41-6-69, and his investigative stop does not pass muster for a Fourth Amendment inquiry into probable cause.

II. BECAUSE THE TRIAL COURT DID NOT ULTIMATELY RULE ON THE MEMORANDUM OR THE ARGUMENTS REGARDING THE CONSTITUTIONALITY OF UTAH CODE § 41-6-69, TROOPER NICHOL'S GOOD FAITH RELIANCE ON THE STATUTE IS IRRELEVANT.

The State takes issue with the trial court's finding that Utah Code Ann. § 41-6-69 was "ambiguous," arguing that by implication, the trial court also held that the statute was unconstitutional as applied to Mr. Montoya. *(Id.)* Though the defendant did submit a Memorandum of Law arguing that the statute should be found void for vagueness, there is absolutely no evidence in either the court record or the State's Brief that the trial court ever read this Memorandum, let alone make its findings

statute was unconstitutional as applied to Mr. Montoya. *(Id.)* Though the defendant did submit a Memorandum of Law arguing that the statute should be found void for vagueness, there is absolutely no evidence in either the court record or the State's Brief that the trial court ever read this Memorandum, let alone make its findings based on the arguments contained therein. The reason for this is that the Memorandum was submitted at the time of the hearing on Defendant's Motion to Suppress, and the court had been unaware that such a document had been prepared by defendant's counsel.

Further, while it is true that the trial court did state as part of its holding that it found the statute ambiguous, the court did not ignore the question of whether Trooper Nichols had witnessed a violation of law, as the State argues. In fact, the court gave its reasoning as to why it believed a violation of law had not occurred by giving a hypothetical set of circumstances in which Mr. Montoya's actions would have violated the statute if he had failed to signal when he was parking along State Street, where there are marked lanes and a designated far right shoulder for parallel parking. By implication, the court was indicating that given such a scenario, Mr. Montoya would have been either changing lanes, or engaging in the type of action envisioned in the very cases cited by the State, such as *Preece, Parker,* and *Gregoire.* This line of reasoning goes precisely to the question of whether Mr. Montoya did or

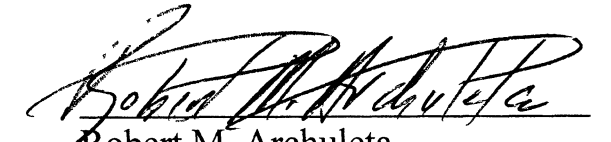
found, "I've heard no evidence that this driver impaired anybody in any way, shape or form." (Tr. 23, 3-4).

Because the trial court did find that there was not a probable cause to the stop (*Id.* at p. 23), the whole issue of whether the statute should or should not have been declared void for vagueness becomes irrelevant, and since that particular issue was hardly raised by either party at the hearing on Defendant's Motion to Suppress, Roman numeral *II* of the State's argument is moot and need not be addressed.

CONCLUSION

The trial court having found to its satisfaction that the facts of the present case did not constitute a violation of Utah Code Ann. § 41-6-69, its granting of Defendant's Motion to Suppress should be treated with a "measure of discretion." *State v. Pena,* 869 P.2d 932 (Utah 1994). For the foregoing reasons, the decision of the trial court suppressing evidence and dismissing the case should be affirmed and the case should not be reinstated or remanded for further proceedings.

RESPECTFULLY SUBMITTED this 30TH day of January, 2007.



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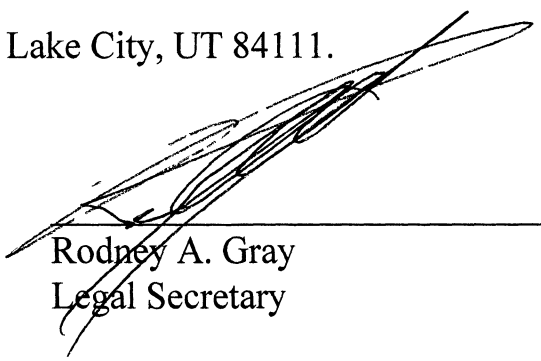
CERTIFICATE OF HAND DELIVERY

I hereby certify that on this 30th day of January, 2007, I personally hand delivered eight copies of Brief of Appellee to the Utah Court of Appeals, c/o Clerk of the Court, 450 South State Street, Salt Lake City, Utah 84111–one with an original signature, and two copies were served on the Salt Lake City Prosecutor's Office, c/o Aaron Flater & Tyson Hamilton, Attorneys for Plaintiff/Appellant, 349 South 200 East Suite 500, Salt Lake City, UT 84111.



Rodney A. Gray
Legal Secretary